## QUESTIONS PRESENTED

1. Whether the Constitution or federal law requires state courts—having remedied constitutional flaws in a state tax statute by striking certain impermissible preferences—to give the benefit of those preferences for past years to all taxpayers who did not receive them.

2. Whether the Eleventh Amendment bars this Court from ordering state officials to make tax refunds from the state treasury.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-192

MCKESSON CORPORATION,
*Petitioner*,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
*Respondents*.

**On Writ of Certiorari to the Supreme Court of Florida**

## BRIEF FOR RESPONDENTS

### STATEMENT

This case involves a challenge to a Florida statute that granted tax preferences for alcoholic beverages made from specified citrus, grape, and sugarcane products. The state trial court held that the preferences violated the Commerce Clause and, by way of remedy, struck them from the statute. The Florida Supreme Court affirmed both the decision on the merits and the particular remedy; it declined to extend the preferences to petitioner and, thus, denied its claim to have any prior taxes refunded. It is that denial to which petitioner now objects.

The State of Florida has long derived a substantial portion of its revenues from a tax on alcoholic beverages. From the 1950's until 1985, the State imposed a

broad-based tax on manufacturers and distributors of alcoholic beverages within the State. *See, e.g.*, Fla. Stat. §§ 564.06, 565.12 (Supp. 1984); §§ 564.06, 565.12 (Supp. 1972). The statutes, however, contained special exemptions and reductions from the generally-applicable tax for products made in Florida. Fla. Stat. §§ 564.06, 565.12 (Supp. 1984); §§ 564.06, 565.12 (Supp. 1972). After this Court held that a similar exemption scheme in Hawaii violated the Commerce Clause, *see Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Florida Legislature promptly amended sections 564.06 and 565.12 and passed the statutory provisions at issue in this litigation. 1985 Fla. Laws Ch. 85-203, 85-204; Fla. Stat. §§ 564.06, 565.12 (1985). The new provisions, which became effective on July 1, 1985, contained exemptions and reductions for enumerated citrus, grape, and sugarcane products. Although the products are found in Florida, they are found in other states and countries as well, and the new provisions were not limited to Florida-based products.

The 1985 tax scheme, while complicated in detail, is relatively simple in outline. First, the statute divides alcoholic beverages into five categories: low-alcohol beverages; medium-alcohol wines; natural sparkling wines; medium-alcohol liquors; and heavy-alcohol liquors. Next, the statute provides for a flat tax on each gallon of product sold, with the rate varying from $2.25/gallon to $9.53/gallon depending on the particular product.[1] Finally,

[1] The 1985 statute established the following tax rates for alcoholic beverages:

| *Product* | *Tax Rate* |
|---|---|
| 1. low-alcohol beverages (1%-14% alcohol, excluding natural sparkling wines and malt beverages) | $2.25 per gallon (*see* § 564.06(1)) |
| 2. medium-alcohol wines (wines with more than 14% alcohol, excluding natural sparkling wines) | $3.00 per gallon (*see* § 564.06(3)) |
| 3. natural sparkling wines | $3.50 per gallon (*see* § 564.06 (4)) |

[Continued]



the statute establishes a series of exemptions and preferences, ranging from exemptions for sacramental wine and beverages on federal bases, Fla. Stat. §§ 564.06(5), 564.06(8), 565.12(4) (1985), to preferences for products made from specified citrus and grape products and, for liquors, from specified sugarcane products as well. Fla. Stat. §§ 564.06(2), 564.06(3), 564.06(4), 565.12(1)(b), 565.12(2)(b) (1985).

The tax on so-called "preferred products" is not measured by a flat rate but according to a formula or sliding scale, depending on the particular product. To determine the tax per gallon for a given month, the state Department of Business Regulation totals together all sales in the relevant category for the prior month—that is, sales of all distributors—and then selects the proper rate from the applicable formula or sliding scale.[2] The

[1] [Continued]

| | |
|---|---|
| 4. medium-alcohol liquors (beverages, except wines, with 14%-48% alcohol) | $6.50 per gallon (*see* § 565.12(1)(a) |
| 5. heavy-alcohol liquors (beverages, except wines, with more than 48% alcohol) | $9.53 per gallon (*see* § 565.12(2)(a)) |

[2] For example, the tax on medium-alcohol wines in the 1985 statute would be calculated as follows:

| *Sales in prior month* | *Tax rate* (*see* § 564.06(10)(c)) |
|---|---|
| less than 12,500 gallons | $1.50 per gallon |
| more than 12,500 gallons | $3.00 per gallon (same as the flat rate) |

The tax on natural sparkling wines would be calculated according to a different scale:

| *Sales in prior month* | *Tax rate* (*see* § 564.06(10)(d)) |
|---|---|
| 0-2,000 gallons | $1.50 per gallon |
| 2,001-4,000 gallons | $2.00 per gallon |
| 4,001-6,000 gallons | $2.50 per gallon |
| 6,001-8,000 gallons | $3.00 per gallon |
| more than 8,000 gallons | $3.50 per gallon (same as the flat rate) |

[Continued]

higher the sales, the higher is the tax. If a certain level of sales is reached for any category of preferred product, the tax for that product is set at the same flat rate paid for sales of other products in that category.[3]

The tax is paid in almost all cases by distributors, of which petitioner is one. Under Florida law, manufacturers may not sell directly to retail dealers, and distributors thus serve as necessary intermediaries.[4] It is a matter of choice for distributors whether they will sell preferred products, non-preferred products, or both. According to state estimates, the overwhelming majority of sales by volume—approximately 97.5 percent—is of non-preferred products. Likewise, the overwhelming bulk of tax dollars derived from the alcoholic beverages—approximately 98 percent—is from sales of non-preferred products. In fiscal 1985-86 alone, the excise tax on wine and liquor totalled close to $250 million.

In September, 1986, more than 14 months after the 1985 Act took effect, petitioner filed suit in state court against the Division of Alcoholic Beverages and Tobacco and the Office of the Comptroller. Raising a range of state and federal claims, petitioner sought both injunc-

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[2] [Continued]

*See also* Fla. Stat. §§ 564.06(10)(a), 565.12(6) (1985).

In July and August of each year, the preferences for most products are inapplicable, and all products in the same category are taxed at the flat rate. Fla. Stat. §§ 564.06(10)(a), 564.06(10)(c), 564.06(10)(d), 565.12(5)(1985).

[3] The exemptions and reductions carry accompanying "take-back" provisions: they do not apply to alcoholic beverages manufactured in jurisdictions that utilized discriminatory taxes, agricultural price supports, or export subsidies to benefit locally-produced alcoholic beverages. Fla. Stat. §§ 564.06(9); 565.12(1)(c); 565.12(2)(c) (1985).

[4] Florida law divides traffic in alcoholic beverages into three tiers, each of which requires a license: (1) manufacture or importation; (2) wholesale distribution; and (3) retail sales. Fla. Stat. § 561.14 (1985). Distributors are required to forward the excise tax to the State. Fla. Stat. §§ 561.50, 561.506, 565.13 (1985).



tive relief and "a refund of alcoholic beverage taxes" from the State for the implementation of the new, post-*Bacchus* tax structure. Joint Appendix ("J.A.") 1-10.[5] In particular, petitioner challenged what it alleged to be impermissible discrimination in the tax.[6]

The Florida trial court granted petitioner's motion for partial summary judgment, invalidating the exemptions and reductions for specified products. J.A. 261-63. The court specifically found that the 1985 "amendments were an effort by the Legislature to overcome the constitutional problems in the Florida alcoholic beverages laws resulting from the *Bacchus* decision." J.A. 262-63. The court concluded, however, that the "legislation failed to surmount the constitutional violations addressed in *Bacchus*." *Id.* at 263. To correct the constitutional fault, the court enjoined enforcement of the exemptions and reductions, including their accompanying "take-back" provisions; it thus made all distributors subject to the generally-applicable tax on the five categories, except for the religious use and federal base exemptions. *Ibid.* The trial court also announced that the decision would apply "prospectively." *Ibid.*

The Florida Supreme Court affirmed the trial court in all respects. J.A. 414-30, 524 So.2d 1000 (Fla. 1988). In an extended analysis, the Florida Supreme Court agreed that the 1985 tax exemptions and reductions violated the

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[5] In its complaint, petitioner requested a refund of all the taxes that it had paid under the Florida tax statute. J.A. 10. By the time the case had reached the Florida Supreme Court, petitioner sought the "difference between the disfavored product's tax rate and the favored product's tax rate." J.A. 430. It has reiterated that claim in this Court. Pet. Br. at 48.

[6] Petitioner did not challenge the State's authority, absent the discriminatory provisions, to impose the tax at issue. It did not, for instance, claim that it lacked sufficient nexus to the State to justify imposition of a tax, or that the tax itself was somehow inherently beyond the State's jurisdiction.

Commerce Clause because they placed "a clear discriminatory burden on interstate commerce which the state has failed to justify in terms of legitimate local benefits other than the admitted benefits to local industry flowing from the statute." J.A. 422. The Florida court noted that the State could have legitimately served its interest in promoting local industry through alternative means, but held that the use of unequal taxes was impermissible.[7]

The Florida court also affirmed the judgment that the finding of unconstitutionality would operate prospectively, thereby granting injunctive relief and striking down the tax exemptions and reductions, but not allowing a refund of the taxes paid by petitioner. It found that the prospective nature of the rulings below was proper in light of the equitable considerations in this case. J.A. 430 (citing *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973)). The court noted that "the tax preference scheme [was] implemented . . . in good faith reliance on a presumptively valid statute," and further pointed out that "if given a refund, [petitioner] would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." J.A. 430.[8]

[7] The Florida Supreme Court noted the existence of permissible means such as property tax relief to Florida manufacturers or growers, direct cash subsidies, state-sponsored research, or state-sponsored promotional campaigns for alcoholic beverages made from Florida crops. J.A. 428-29.

[8] Following this decision in May 1988, the Florida legislature enacted a new tax that placed a uniform tax on sales of alcoholic beverages but imposed a tax directly on the importation of alcoholic beverages into the State. 1988 Fla. Laws Ch. 88-308. *See State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding tax on imported alcoholic beverages); *Heublein, Inc. v. Georgia*, 351 S.E.2d 190 (Ga.), *appeal dismissed*, 107 S.Ct. 3253 (1987). Petitioner did not challenge this new tax. Another litigant did so, however, and obtained an injunction against its enforcement. *Bacardi Imports, Inc. v. Ivey*, 88-2581 (Second Judicial Circuit of Florida, Nov. 30, 1988), *appeal pending*, Case No. 73,424 (Florida Supreme Court). Pursuant to that injunction—and a reverter clause in the new statute—sales are once again taxed at the various flat rates provided in the 1985 statute. 1988 Fla. Laws Ch. 88-308, Section 12.



## INTRODUCTION AND SUMMARY OF ARGUMENT

The claim made by petitioner—ostensibly one of a "retroactive" right to tax preferences—is not quite what it seems. The Florida courts, while agreeing that the State had improperly imposed unequal taxation, chose to end the inequality by striking the offending preferences from the statute. This solution was obviously compelled by the overall purpose of the legislation, given that the preferences were but a small part of a comprehensive taxing scheme, and it is not challenged by petitioner here. What petitioner wants, instead, is for this Court to mandate different relief for the past than for the future: in short, to extend to it, on a "retroactive" basis, the very preferences that the Florida courts eliminated.

This demand suffers from several serious shortcomings. First of all, it is clear that petitioner has no federal right to state tax preferences, even though the preferences temporarily resulted in a condition of inequality. This Court has frequently held that the flaw of an underinclusive statute, like the one here, may be cured either by extending the benefit (as petitioner wants) or by withdrawing it (as the Florida courts decided to do). *See, e.g., Heckler v. Mathews*, 465 U.S. 728 (1984); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). It would be perverse to have a rule that, whenever a state court decides to withdraw the benefit for the future, it must also order its recapture from all prior recipients or else provide the benefit after-the-fact to everyone not receiving it. Here, having weighed the "equitable considerations," including the likelihood that petitioner simply passed on the tax, the state courts

acted well within the bounds of their authority in concluding that injunctive relief was a sufficient remedy.

There is also no right to a refund lurking in the "retroactivity" principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Here, unlike the situation in *Chevron*, the Florida Supreme Court did not hold that its decision striking down the statutory preferences would be inapplicable to petitioner; it simply held that application of the decision did not free petitioner from any tax liability. Indeed, had petitioner sought and obtained its injunction on the day before the statute took effect, the order would have made no difference to its tax bill: then, as afterwards, it would have paid at the generally-applicable rate. Furthermore, even if the analysis in *Chevron* were strictly followed, a weighing of the relevant factors—in particular, the potential impact on the state treasury of providing a "windfall" to petitioner and other distributors—would strongly support the decision not to extend a tax refund. Finally, it seems that petitioner would not be entitled to a tax refund anyway; the tax owed under the sliding scales applicable to the preferences would likely turn out to be the same as the tax already paid under the flat rates.

We also believe that the Eleventh Amendment would bar this Court from awarding the relief that petitioner seeks. This Court has made clear that, in respect of the immunity embodied in the Eleventh Amendment, federal courts may not grant relief in "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *see Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). That restriction applies to this Court as well as to the lower federal courts. *See Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (Eleventh Amendment bars suit in this Court). Thus, while this Court can hear claims brought by a State, *see Cohens v. Virginia*, 19



U.S. (6 Wheat.) 264 (1821), or claims for injunctions against state officials, *see Ex Parte Young*, 209 U.S. 123 (1908), or suits against state officers in their individual capacities, *Scheuer v. Rhodes*, 416 U.S. 232 (1974), it cannot order the payment of past obligations from the state treatury. *See State of Louisiana ex rel. New York Guaranty & Indem. Co. v. Steele*, 134 U.S. 230 (1890). That payment is precisely what petitioner is demanding here.

## ARGUMENT

Petitioner comes before this Court in an unusual posture. Although it prevailed below on its claim that various Florida tax preferences violated the Commerce Clause, the state courts held that the proper remedy was to eliminate the preferences from the statute. To sustain its claim for a tax refund, therefore, petitioner is forced to argue that, while the preferences are no longer part of the state taxing scheme, it nonetheless has a federal right to claim them for years past. For the reasons discussed below, the argument is wholly unpersuasive.

### I. THE STATE COURTS HAVE PROVIDED A CONSTITUTIONALLY-ADEQUATE REMEDY BY STRIKING DOWN THE UNLAWFUL TAX PREFERENCES.

#### A. Petitioner Has No Federal Right To The Invalidated Tax Preferences.

It is necessary, at the outset, to review briefly the grounds on which petitioner challenged, and the state courts struck down, the taxing provisions at issue in this case. Petitioner did not contend—and certainly no court determined—that the State lacked the power to tax petitioner or, indeed, to tax petitioner in precisely the amount that it did. The claimed defect in the statute was that Florida had included a partial exemption from the general tax for products made from crops commonly grown in the State. In short, the taxing scheme was

"underinclusive" because its provisions did not apply equally to all products.

The proper remedy for an underinclusive statute is not, as petitioner would have it, automatically to extend favored treatment to everyone else. While that choice is a permissible one, it is not one required by the Constitution. As Justice Harlan stated, "[w]here a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result). *See also Califano v. Westcott*, 443 U.S. 76, 89-90 (1979) (applying Justice Harlan's *Welsh* analysis regarding underinclusive statutes); *Orr v. Orr*, 440 U.S. 268, 272 (1979) ("In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties . . . .").[9]

The requirement of equal treatment thus is not a one-way street. It does not require—or even presume—that the successful objector receive the benefit that he has been denied. As the Court unanimously stated in *Heckler v. Mathews*, 465 U.S. 728 (1984), "when the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 740 (emphasis in original). The Court further explained: "Consistent with Justice Brandeis' explana-

[9] Although the underinclusiveness analysis frequently arises in equal protection claims, it is not confined to such claims. *See Welsh v. United States*, 398 U.S. at 362 n.15 (Harlan, J., concurring in result).



tion of the appropriate relief for a denial of equal treatment [in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931)], we have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others." *Id.* at 740 n.8.

The necessary effect of this rule, as this Court has acknowledged, is that even a successful plaintiff may not actually receive the benefits previously given to a favored class. In *Stanton v. Stanton*, 421 U.S. 7 (1975), for instance, a mother seeking additional child support for her daughter successfully challenged a statute setting the age of majority for girls at 18 years and for boys at 21 years; the Court specifically noted, however, that the mother still might not obtain the monetary relief that she sought. Pointing out that the differential could be remedied as effectively by lowering the age for boys as by raising it for girls, the Court stated: "[t]he appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit." *Id.* at 18. Likewise, in *Heckler v. Mathews*, *supra*, the Court observed that a claim for equal treatment and a claim for financial recovery were not one and the same, noting that the Court had "frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class." 465 U.S. at 739.[10]

[10] *See also Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 152-53 (1980) (widower who successfully objected to gender-based difference in conditions for death benefits is not necessarily entitled to benefits that widows had received); *Orr v. Orr*, *supra*, 440 U.S. at 272 (husband who successfully objected to statute requiring only males to pay alimony is not necessarily entitled to benefit of no-alimony obligation).

Although petitioner seems to contend that a different rule must be applied to tax cases (Pet. Br. at 24-32), that theory is simply incorrect. Almost a century ago, this Court stressed a virtual presumption in favor of excising an invalid tax provision and preserving the generally-applicable tax:

> Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.

*Field v. Clark*, 143 U.S. 649, 697 (1892). Forty years later, this Court reiterated that impermissible treatment in a tax provision should not defeat the basic revenue goals and clear legislative purpose of the general statute:

> We find no warrant for concluding that the Legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that, if the Legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity.

*Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 185 (1932).

Several terms ago, the Court made clear that impermissible tax preferences, like other invalid preferences, may be either extended or eliminated. *See Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). There, petitioner (a Vietnam veteran) objected to tax exemptions given only to Vietnam veterans who had lived in New Mexico before the time of his arrival. This Court



held that the taxing scheme violated the equal protection clause, but it left the appropriate relief to the state courts. In so doing, it emphasized that it was for those courts to decide, in accordance with the legislative purpose, whether the tax exemption should be extended or invalidated. 472 U.S. at 624.

The gravamen of petitioner's complaint thus must be that the remedy ordered here, while enough to assure equality for the future, does not provide full equality for the past. But this Court has never held that a state court, having withdrawn an improper benefit, is compelled to order its recovery from those having received it or, if it does not, then extend it *post hoc* to everyone denied it. As we have noted, in *Stanton v. Stanton*, *supra*, the Court pointed out that the plaintiff might not gain any additional support for her daughter, with no indication that this result could occur only if all payments to parents of male children were recovered. 421 U.S. at 17-18. Similarly, in *Wengler v. Druggists Mutual Ins. Co.*, *supra*, the Court left it to the state courts to decide "whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows" (446 U.S. at 152); nothing in the opinion suggests that, if the choice were the latter, all prior payments to widows would have to be rescinded unless widowers were given the same payments.[11]

It would be particularly out-of-place, moreover, to create and enforce an overriding federal right to past benefits in cases, like this one, arising under the Commerce Clause. Although that clause limits state power to regulate and tax interstate commerce, *see, e.g., Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333,

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[11] There may be particular cases in which the denial of past benefits will effectively leave the plaintiff without any relief at all. *See, e.g., Iowa-Des Moines Nat'l Bank v. Bennett*, *supra*. As we discuss below, this is not such a case. *See* pages 18-19, *infra*.

350 (1977), it does so in favor of the national interest in open trade among the States, not in favor of individual business interests. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-42 (1949); *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139, 1144-45 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984).[12] The national interest, in most if not all cases, can be adequately served by removing the particular barrier to commerce, without also subjecting the erring State to enormous accrued obligations.

It seems obvious, in fact, that a federal rule mandating back payments would put lawmakers in an impossible position. Virtually all taxing and general welfare statutes place persons in different categories and create exceptions to governing rules. Because it would be impractical in most cases, as well as exceedingly harsh, to retrieve benefits wrongly paid or demand back taxes from exempted individuals, the theory advanced by petitioner would mean, in practical terms, that every invalid exception necessarily became the rule. By such logic, if the courts below had struck down the exemption in the Florida statute for sacramental wine, the State would have no choice but to relieve all distributors of their tax liability for the period of the exemption or demand back taxes for sales of sacramental wine. There is no basis in the Constitution—and particularly none in the Commerce Clause—for requiring so absurd a result.

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[12] It is thus plain that Congress, acting pursuant to the power conveyed by the Commerce Clause, can subject individual business interests to regulation that would be beyond the authority of individual states. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981) ("[o]ur decisions do not . . . limit the authority of *Congress* to regulate commerce among the several States as it sees fit") (emphasis in original).



The doctrine advocated by petitioner would also have the effect of rewarding plaintiffs who sat on their claims. The gist of its argument is that a plaintiff who successfully challenges a tax preference must be given the benefit of the preference while it was in effect, and thus a refund of taxes paid at the general rate; yet, even petitioner does not dispute that, if the same plaintiff obtained an injunction against the preference *before* it took effect, it would have to pay at the general rate and would be entitled to no refund at all. The same incentive for delay would exist for any claimant seeking a statutory benefit: the longer the time before challenging unequal treatment, the larger the supposed entitlement would become. That result is just the opposite of what a rational rule of law should encourage.

In short, petitioner has no inherent federal right to the relief that it seeks. As we discuss next, the state courts resolved the competing interests in a fair and reasonable manner, and the remedy afforded to petitioner was well within the bounds of its authority.[13]

### B. The State Courts Properly Denied Petitioner's Claim For A Refund.

The decision of the state courts to withdraw rather than extend the tax preference at issue here, and the corresponding decision not to provide a tax refund to petitioner, are reasonable and fully consistent with remedial principles. Any other outcome, in fact, would provide petitioner (and others in its position) with an unjustified windfall and have a needlessly severe impact on the state taxing scheme.

When the coverage of state legislation is challenged on constitutional grounds, this Court has recognized that the

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[13] Petitioner makes a policy argument that this Court must recognize a federal right to a refund to prevent state legislatures from repeatedly enacting unconstitutional statutes. We address that argument at pages 29-30, *infra*.

state courts are better able to make the necessary determinations about state legislative intent and proper remedy. Thus, in *Wengler v. Druggists Mutual Ins. Co.*, *supra*, the Court stated: "Because state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying this constitutional violation." 446 U.S. at 152-53. *See Stanton v. Stanton*, *supra*, 421 U.S. at 17-18.[14] The Court has taken the same approach where state taxing provisions were involved. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-97 (1983) (remand to state court to determine whether successful litigants are entitled to tax refund); *Hooper v. Bernalillo County Assessor*, 472 U.S. at 624 (1985) ("It is for the New Mexico courts to decide, as a matter of state law, whether the state legislature would have enacted the statute without the invalid portion"); *Williams v. Vermont*, 472 U.S. 12, 28 (1985).

The Florida courts here concluded that the legislature would have wanted the preferences severed from the statute rather than enlarged to cover sales of all products.[15] Even if the question were still an open one, that conclusion would be virtually inescapable. The general

[14] In considering the underinclusiveness of state statutes, this Court has sometimes emphasized deference to the state legislature for the remedial judgment about extension or invalidation. *See Craig v. Boren*, 429 U.S. 190, 210 n.24 (1976).

[15] Although the inquiry arises only because of a finding of unconstitutionality, the proper reach of the statute turns on matters of state law and legislative intent. *See Zobel v. Williams*, 457 U.S. 55, 65 (1982); *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942). *Cf. Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part) ("In choosing between these alternatives [of extension or withdrawal], a court should attempt to accommodate as fully as possible the policies and judgments expressed in the statutory scheme as a whole . . . . It should not use its remedial powers to circumvent the intent of the legislature").



tax at issue accounts for nearly $250 million each year in state revenue, while the products covered by the preferences amount to only a tiny portion (less than 3 percent) of the sales subject to tax. *See* page 4, *supra*. There is absolutely no possibility that the legislature would choose to have all products taxed at a preferential rate, if the possible effect would be to reduce state revenues by hundreds of millions of dollars annually. The legislature, in fact, has said as much: a reverter clause in the 1988 statute provides that, in the event that the statute is held unconstitutional, all products shall be taxed under the 1985 statute as construed by the Florida Supreme Court in this case. 1988 Fla. Laws Ch. 88-308, Section 12.[16]

The decision not to extend the preferences, or to give petitioner the benefit of them for past years, is also strongly supported by the "equitable considerations" emphasized by the Florida court. J.A. 430. Indeed, measured by principles of equity, petitioner's claim for a refund is uncommonly weak. To begin with, there is nothing inherently unjust about the tax imposed on petitioner; the State has unquestioned jurisdiction over the sale of alcoholic beverages within its borders, and the tax is fairly related to that event.[17] Furthermore, petitioner is not in

[16] As discussed at pages 27-28, *infra*, we believe that petitioner would not actually pay less tax if the various sliding scales and formulas applicable to preferred products were applied to all products, including those that it distributes. The provisions of the 1988 statute, however, make clear the form of remedy preferred by the legislature.

[17] This case thus does not present, and this Court need not decide, the question whether a taxpayer subjected to an unapportioned tax, or a tax without any jurisdictional basis, would be entitled to a refund. *See Ward v. Board of County Comm'rs*, 253 U.S. 17 (1920) (lack of authority to tax Indian allotments) and *Carpenter v. Shaw*, 280 U.S. 363 (1930) (same). In such a situation, the evil is not the disparate treatment, but the very imposition of a tax, regardless of the treatment of others similarly situated. A varia-

the position of a taxpayer seeking to be treated like most other taxpayers, as is the case whenever a few taxpayers are singled out for unusual exactions; here, the taxes at issue are generally applied, and it is the preferences that affect a very small group. What petitioner wants, in essence, is to use the existence of those preferences as a device to escape most of its tax liability for several years of beverage sales.

It is also relevant that petitioner has received significant relief. The courts below did not send petitioner away empty-handed; to the contrary, they specifically addressed its concern about the lower taxes paid on preferred products, ordering that the inequity be stopped. This case is thus quite different from cases, on which petitioner vigorously relies, where this Court has determined that refunds were the only feasible remedy for maladministration of an apparently valid state statute. *See Iowa-Des Moines Nat'l Bank v. Bennett, supra; Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *see also Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 57 U.S.L.W. 4095 (January 18, 1989).[18] Where discriminatory assessments are imposed on a minority of taxpayers in violation of state law, this Court has indicated that taxpayers challenging those assessments cannot be remitted to the alternative (and utterly impractical) course of challenging

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tion of the same problem is presented in *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928), which turned on a lack of statutory authority to tax shares of national banking associations at a greater rate than other moneyed capital.

[18] We note that, only four years after *Iowa-Des Moines*, its author, Justice Brandeis, joined a dissent by Justice Cardozo explicitly recognizing that an objector to unconstitutional disparate treatment in state tax deductions was not necessarily entitled to the benefit of the deductions, and that the entitlement turned on questions of state law and legislative purpose. *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113, 132 (1935) (Cardozo, J., dissenting).



all of those assessments greater than their own. Here, however, the injunction issued by the Florida Supreme Court immediately established the equality that petitioner sought, mandating equal tax rates for all sales of alcoholic beverages.[19]

The Florida Supreme Court also emphasized that distributors like petitioner "pass on" the excise tax to consumers. As the Florida court concluded, "if given a refund, cross-appellants [including McKesson Corporation] would in all probability receive a windfall, since the cost of the tax has likely been passed on to their customers." J.A. 430. In a subsequent case considering distributors' claims for a refund under the pre-*Bacchus* tax statute, the Florida Supreme Court reiterated this fundamental point: "As in *McKesson, appellants already have passed on the excess taxes to their customers*, the taxpayers of Florida, and the funds from those taxes have been appropriated and expended by the state."

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[19] The other cases cited by petitioner are off the point. They are, variously, Commerce Clause cases that say not one word about remedy, *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); an Export-Import Clause case that found a state tax completely barred by that Clause, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964); and a case reflecting this Court's exceptional latitude in exercising original jurisdiction. *Maryland v. Louisiana*, 452 U.S. 456 (1981). None of these cases even touches on the automatic entitlement rule that petitioner seeks.

Nor does *Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912), provide support. In *Atchison*, the sole issues before the court were whether "the payment was voluntary" and whether the defendant was "the proper person to be sued." *Id.* at 285. The court concluded that the payment was made under duress and that the defendant was proper. Neither holding bolsters petitioner's contention.

*National Distrib. Co. v. Office of the Comptroller*, 523 So.2d 156, 158 (Fla. 1988) (emphasis added).[20]

A refund to petitioner, therefore, would almost certainly result in a double recovery. Having received the money once from its customers, it would receive it a second time from the State. But the likely unfairness goes even further. For if the State now raised the beverage taxes to make up for the refunds, distributors like petitioners presumably would pass through the taxes (including the increase) once again—to the same customers that paid the tax the first time. It was entirely reasonable for the Florida Supreme Court to regard this outcome as unnecessary and inequitable.

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[20] This "pass-on" analysis has profound significance in state law. Under Florida law, no refund is permissible if the taxpayer, although the one upon whom the legal incidence of the tax falls, is not the party who bears the financial burden. *State ex. rel. Szabo Food Service, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973). In this case, the Florida statutes make it absolutely clear that, although the legal incidence of the excise tax falls upon distributors such as petitioner, the distributors would be mere collection conduits for the tax. *See* Fla. Stat. § 561.50 (1985) (tax not due until sale); Fla. Stat. § 561.506 (1985) (wholesaler deductions from tax collection payments); Fla. Stat. § 565.13 (1985) (tax not due until 10th of month following month of sale). Notably, in arguing that state law requires a refund (Pet. Br. at 45-47), petitioner ignores this aspect of state law.

Petitioner has never denied that it passed on the excess taxes; it now claims instead that, if the tax was passed on, petitioner thereby suffered competitive injury. Pet. Br. at 42. But petitioner in its complaint sought a tax "refund," not "damages" for some indirect economic loss. *See* note 5, *supra*. Moreover, under Florida law, it is quite clear that the State's waiver of sovereign immunity applies only to tax refund claims when the taxpayer has borne the actual burden of the tax, *Szabo*, *supra*, and not to claims for damages from a legislative act. *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 918-919 (Fla. 1985).



Finally, the Florida Supreme Court could properly consider the effects of a refund on the state taxing scheme. Given the money raised each year by the general beverage tax, the sums at issue here, and in other possible cases, could amount to hundreds of millions of dollars. It would be imposisble for the State to make refunds of anything like that amount without severely cutting other programs or imposing an increase in future taxes (beverage or otherwise). In addition, to create and implement an administrative scheme for recalculating and refunding taxes would be cumbersome and costly. All this might be necessary in a case of severe injustice, but this is hardly such a case.

The Florida Supreme Court recognized that it was undertaking a difficult equitable task in remedying a constitutional violation through the restructuring of a state statute. The cases that it cited reflect this recognition. *See Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*); *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (1973). In *Lemon II*, this Court emphasized that "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what it necessary, what is fair, and what is workable." 411 U.S. at 200 (plurality opinion) (footnote omitted). The Court also noted that, in fashioning remedies, courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." *Id.* at 201. In structuring a remedy after careful analysis of the constitutional violation, the Florida court looked to the practical realities and reached a considered judgment about necessity, fairness, and feasibility. Petitioner might prefer a different remedy, but its preference is without constitutional basis.

### C. The Decision In *Chevron Oil Co. v. Huson* Does Not Require That Petitioner Get A Tax Refund.

Although petitioner engages in an extended discussion of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (*Chevron*), and later cases involving "retroactivity," those cases do not help petitioner here. Petitioner is not asking that the decision below (that the preferences are invalid) be made "retroactive"; it is asking that a completely different decision (that everyone is entitled to the preferences) be announced for the past. Nothing in *Chevron* or its progeny requires such a tortuous result.

It is not immediately clear, in the first place, that the "retroactivity" analysis in *Chevron* would provide a basis for overruling the remedial choices of state courts. This Court stated in *United States v. Johnson*, 457 U.S. 537 (1982), that the " 'federal constitution has no voice upon the subject' of retrospectivity." *Id.* at 542. That statement repeats the observations of Justice Cardozo, in considering the retroactivity of a state court opinion on the applicability of state law, that "the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Great Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364 (1932). *See also Linkletter v. Walker*, 381 U.S. 618, 629 (1965) ("the Constitution neither prohibits nor requires retrospective effect"). At a minimum, these principles suggest that state decisions regarding the retroactivity of specified remedies should not be lightly overturned.

In any event, neither *Chevron* nor any other retroactivity case involves a request similar to that made by petitioner here. In *Chevron*, the question was whether the rule of law previously articulated in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969)—that the Outer Continental Shelf Lands Act required the application of state statutes of limitations to certain personal injury suits—applied in a personal injury suit filed against the Chevron Oil Company. The plaintiff (whose claim would be barred under *Rodrigue*) urged that the prior law should be applied, while Chevron Oil argued that *Rodrigue* should govern. Thus, the precise issue was whether a particular new rule of law should be applied to the particular litigants; in finding nonretroactivity, the Court held that it should not.



The situation in *Chevron* is representative of "retroactivity" cases in general. In such cases, one litigant is typically asking that a new rule of law be applied to its situation; the opposing party is urging that prior law be applied. *See St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). Thus, for instance, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Court held that its decision invalidating the bankruptcy courts would not apply to bankruptcy court judgments rendered before that decision. Similarly, in *Lemon II*, the Court concluded that its prior decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), would not apply to payments accrued before the date of that decision, even though they were unconstitutional under the principles there announced.[21] In these cases, as in *Chevron*, the outcome for the affected parties turned on whether the old law or the new law applied to their situation.[21]

This case is very different: here, petitioner is not entitled to a tax refund under either the old law or the new law. Under the old law, of course, petitioner was taxed at the generally-applicable rate, and it paid its taxes

[21] Retroactivity cases in the criminal area similarly pose the question whether the articulated rule of law will apply at all to the litigants. *See Griffith v. Kentucky*, 479 U.S. 314, 321-22 (1987) ("[A]fter we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review").

on that basis. Under the new law, however, petitioner also is taxed at the generally-applicable rate, which is no different. To obtain a refund, therefore, petitioner needs the Court to apply not the old law, or the new law, but a different law—one that gives it the benefit of the invalidated preferences. That is a matter of fashioning a new remedy, not of applying principles of "retroactivity." [22]

We believe, therefore, that the analytical framework set forth in *Chevron* should not be borrowed for claims of this type. But, even under the *Chevron* test, petitioner would not prevail. The analysis in *Chevron* calls for the consideration of "three separate factors," 404 U.S. at 106—whether a decision establishes a new principle of law; whether non-retroactivity will further or retard operation of the legal rule in question; and whether retroactivity will produce inequity. Taken together, these factors suggest that a refund here is not required.

"Equitable considerations," specifically referred to by the Florida Supreme Court, have long been prominent in decisions of nonretroactivity. "[W]e have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hard-

[22] In an underinclusiveness analysis, if a court decides on *extension* of benefits for the future, the case may pose an issue more typical of the *Chevron* line of cases—whether the articulated rule of law, providing for extension of the selectively-conferred benefit, will apply to past conduct. *See Florida v. Long*, 108 S.Ct. 2354, 2359-2363 (1988) (citing *Chevron* in analysis of whether extension of benefits under Title VII should apply to past conduct); *id.* at 2368 (Blackmun, J., concurring in part and dissenting in part); *Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1107 (1983) (O'Connor, J., concurring).



ship" by a holding of nonretroactivity.'" *Chevron*, 404 U.S. at 107 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)). Here, as we have discussed, *see* pages 16-21, *supra*, the relief proposed by petitioner would be patently unjust. On the one hand, petitioner would be largely excused from any tax liability for the years in question; on the other hand, Florida consumers would likely be doubly taxed, and the State would have a primary revenue source thrown into turmoil because of preferences accorded a minuscule share of the wine and liquor market. This prospect presents a classic example of "substantial inequitable results." *Cipriano v. City of Houma*, *supra*, 395 U.S. at 706.

Regarding the operation of the rule, "'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'" *Chevron*, 404 U.S. at 106-07 (quoting *Linkletter v. Walker*, *supra*, 381 U.S. at 629). In the context of this case, however, "retrospective operation" will do little to further Commerce Clause principles. To the extent that the tax preferences created an impediment to interstate commerce, the impediment was extremely slight and, as a result of the decision below, temporary. On the other hand, an order excusing petitioner from most tax liability for several years would conflict with the basic principle that companies or individuals engaged in interstate commerce may be taxed to pay their fair share for the benefits they derive and the burdens they create. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977).[23] The Commerce Clause

[23] *Cf. National Can Corp. v. Department of Revenue*, 109 Wash. 2d 878, 889-90, 749 P.2d 1286, 1292, *cert. denied and appeal dismissed*, 108 S. Ct. 2030 (1988) ("The effect of complete retroactive application with refunds of all taxes paid would be to create a window of tax-free time for taxpayers involved in interstate commerce to the detriment of all other taxpayers").

is intended to stop unacceptable burdens on interstate commerce, not to undermine state tax systems whenever any interference with interstate commerce can be found.

The remaining question, and admittedly a closer one, is the novelty of the legal principle announced in this case. "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106. In our view, although they were ultimately struck down, the invalidity of the Florida preferences was not "clearly foreshadowed" by prior cases. The preferences here were very different, in kind and in effect, from the preference at issue in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which applied solely to products made in Hawaii.[24] As the state courts found, the Florida statute passed in response to *Bacchus* did not establish discrete categories for intrastate and interstate products.[25] Under the 1985 statute, products in both categories qualified for the preferences, and products in both categories were taxed at the full rate.

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[24] In *Bacchus* itself, there was considerable dispute over whether that decision actually overturned settled precedent. *See Bacchus*, 468 U.S. at 282 (Stevens, J., dissenting, joined by Rehnquist and O'Connor, JJ.) (Twenty-First Amendment "expressly authorizes this sort of burden"; "Justice Brandeis' opinion for the Court in the seminal case of *State Board of Equalization v. Young's Market Co.* [299 U.S. 59 (1936)] . . . squarely so decided"; "the Court's reasoning [in *State Board of Equalization*] clearly covers this case").

[25] The Florida Supreme Court noted: "Affidavits from several experts establish that 1) citrus and sugarcane are grown in Florida as well as in other areas of the United States and the world and 2) the specified grape species are grown throughout the Southeastern United States and the Atlantic States Regions." J.A. 423.



The statute also had very different financial provisions. For example, it included sliding scales that took into account possible growth in the market for preferred products (whether made in the State or out-of-state) and provided for full tax equality if their sales reached a certain level. Additionally, regardless of the sliding scales, the statute provided for full tax equality for two months every year. No comparable provisions were present either in Florida's predecessor statute, or in the Hawaii statute. Although the Florida courts ultimately found that these modifications were insufficient to overcome the constitutional problems, that outcome was not the sort of foregone conclusion that petitioner suggests.[26]

Finally, we note that, because of the way that the Florida statute works, it appears that petitioner would not be entitled to the sought-after refund even if the preferences were retroactive. *See* Pet. Br. at 48. What petitioner has failed to take into account, indeed never

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[26] It is entirely possible, moreover, that *Chevron* would permit nonretroactivity if one or two of the factors strongly point in that direction. *Cf. Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, *supra*, 463 U.S. at 1109-10 (O'Connor, J., concurring) (nonretroactivity appropriate because of equitable concerns even though foreshadowing is "debatable" and operation of legal rule will be neither furthered nor retarded by nonretroactivity). Such a view is consistent with the Court's longstanding recognition that retroactivity analysis is far from a mechanical enterprise. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940) ("The actual existence of a statute, prior to such a determination [of unconstitutionality] is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration"). Indeed, since *Chevron*, the Court has sometimes issued a stay of its judgment, or permitted past actions to remain effective despite a subsequent decision, solely because of the impact on the stability of government and without reference to the *Chevron* analysis. *See Buckley v. Valeo*, 424 U.S. 1, 143 (1976); *Georgia v. United States*, 411 U.S. 526, 541 (1973).

even mentions, is that the tax preferences in the 1985 Florida statute are subject to formulas and sliding scales. Fla. Stat. §§ 564.06(10), 565.12(6) (1985). Under the statute, the tax on most preferred products increases in relation to the number of gallons of the product sold prior to the time of calculation. If the volume rises to a sufficient level, the tax for the preferred product will equal the generally-applicable tax. Thus, for instance, if 12,500 gallons or more of the medium-alcohol wines from the enumerated citrus and grape species are sold, the resulting tax—$3.00/gallon—will equal the generally-applicable tax of $3.00/gallon. § 564.06(10)(c). Similarly, if a sufficient number of gallons of natural sparkling wines from the enumerated products are sold, the tax will increase to the generally-applicable rate. § 564.06(10)(d). See note 2, *supra*.

If the sliding scales were applied without any distinction between preferred and non-preferred products—the equality that petitioner wants—it is virtually certain that the maximum rates under the scales would routinely apply. Once the gallons of alcoholic beverages sold by petitioner (and the other distributors who previously paid the generally-applicable tax) are included in the calculation, the applicable rate becomes dramatically different from the rate in effect when the sliding scales were previously calculated. Although petitioner seems to assume that it could claim the rates actually paid on preferred products, it cannot have it both ways—that is, it cannot eliminate the distinction between preferred and non-preferred products in order to use the sliding scales and then resurrect it for the purpose of setting the rates.[27] It appears highly likely, therefore, that petitioner would owe the same amount of tax.

[27] In the Title VII context, this Court's opinions are clear that, if a benefit is extended to those who have previously been excluded from the benefit, the amount of the benefit should itself be recalculated to reflect the changed pool of beneficiaries. *See Florida v. Long*, 108 S.Ct. 2354, 2358 n.2 (1988) (remedy for disparate treatment in gender-based benefits, for which extension rather than invalidation had been selected as the appropriate remedial option under Title VII, was "the benefits [male retirees] would have received if the Florida System had used unisex mortality tables," rather than "benefits equal to those female retirees received under the sex-based tables"); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 719-20 n.36 (1978) (awarding benefits without regard to changed pool of beneficiaries "may give the victims of the discrimination more than their due").



### D. A Refund Is Not Required As A Deterrent Against Future Taxation.

Petitioner devotes a considerable portion of its brief to a policy argument that, unless this Court orders tax refunds, taxpayers will be at the mercy of the state legislatures. Pet. Br. at 22-24, 39-40. As support, it points to Florida's enactment in 1988 of another alcoholic beverages tax, which is likewise being challenged in the state courts. According to petitioner, only the prospect of massive refunds will keep this legislative cycle from continuing.[28]

The first problem with this argument is that petitioner has misstated the relevant history. Thus, while petitioner suggests that, because of the new statute, its efforts in this suit produced no real relief from unequal taxation, that is not the case. In fact, the issuance of the Florida Supreme Court's mandate in May, 1988 invalidated all of the challenged preferences in the 1985 stat-

[28] Although petitioner repeatedly criticizes the Florida legislature for attempts to help local industry, it should be noted that there is nothing improper about this goal. *See Bacchus Imports, Ltd. v. Dias*, *supra*, 468 U.S. at 271 ("No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging local industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal"); *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.* (Florida Supreme Court), J.A. 428-29 (State could have furthered goal through a variety of other methods, including direct subsidies).

ute, and only the generally-applicable tax remained in effect until the effective date of the new statute in August, 1988. Moreover, implementation of the differential tax structure reflected in the new tax statute has been enjoined since the trial court decision on November 30, 1988 (a fact petitioner never mentions),[29] and the generally-applicable tax under the 1985 statute has once again been in effect since that judgment (another fact petitioner never mentions). Thus, since the issuance of the Florida Supreme Court's mandate in May, 1988 in the case under review, there has been only a brief period in which anything besides a generally-applicable tax has been in effect.

Petitioner also gives no weight to the fact that the state courts have expeditiously entertained objections to the state statutes, and given plaintiffs broad injunctive relief by invalidating various provisions. Far from working hand-in-glove with the legislature, the state courts have proved highly sensitive to concerns about unequal taxation. In this case, for example, the Florida Supreme Court undertook a careful analysis of the governing case law, ultimately concluding that the legislative effort was insufficient to remove the constitutional infirmity. The trial court, reviewing the 1988 statute, found that it, too, fell on the wrong side of the constitutional line. These courts remain open to petitioner, either to enforce its present injunction or, if necessary, to obtain a new one.

## II. THE ELEVENTH AMENDMENT PROHIBITS THIS COURT FROM ORDERING A REFUND FROM THE STATE TREASURY.

Petitioner's claim for a refund must fail for another, independent reason: the Eleventh Amendment prevents this Court from ordering the State to pay petitioner the sum that it seeks. As we discuss below, it is clear, *first*,

[29] *Bacardi Imports, Inc. v. Ivey*, 88-2881 (Second Judicial Circuit of Florida, Nov. 30, 1988), *appeal pending*, Case No. 73,424 (Florida Supreme Court).



that the Eleventh Amendment bars a federal court from granting monetary damages against a State and, *second*, that the Amendment applies fully to this Court.

### A. In A Suit By A Private Party Against A State, A Federal Court Cannot Order The Payment of Funds From A State Treasury.

The familiar language of the Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The governing principle of that Amendment is likewise familiar: that "a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). *See also Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

This principle is fully applicable to claims seeking a refund of taxes on the ground that the tax has been imposed unconstitutionally. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Indeed, this Court has noted that, in taxation cases, "the sovereign exemption from judicial interference in the vital field of financial administration" is especially powerful. *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). Consequently, "[w]hen a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts." *Ibid.*[30]

[30] The State of Florida has authorized suits for tax refunds in state court, but it has conditioned its waiver of sovereign immunity

There is little question, therefore, that the claim advanced by petitioner is within the terms of the Eleventh Amendment immunity. Petitioner explicitly asks this Court to direct the state court "to order a tax refund to McKesson" from the state treasury. Pet. Br. at 48. Moreover, because it appears that petitioner is a "Citizen[] of another State," its suit is squarely covered by the language of the Amendment itself. Suits by citizens of "another State" had long been held to be barred by the Eleventh Amendment, *see, e.g., Louisiana v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886), even before the holding in *Hans v. Louisiana*, 134 U.S. 1 (1890), declaring that the Amendment also bars suits by a citizen against his own State.

It is also clear that this Court is a federal court. Article III of the Constitution provides that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, sec. 1; *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803). "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). And, as this Court has admonished, "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *see Aldinger v. Howard*, 427 U.S. 1 (1976).

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on a showing by the taxpayer that it actually bore the financial burden of the tax, rather than shifting it to another. Fla. Stat. § 215.26 (1985); *State ex rel Szabo Food Service, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973). That is a burden that petitioner cannot fairly meet. *See* pages 19-20 and note 20, *supra*.



In keeping with these principles, this Court has held that it has no power to hear a claim that would have the effect of allowing a citizen to demand a payment from a state treasury. In *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), for instance, the Court concluded that the Eleventh Amendment barred an original action filed by one State against another because the real parties in interest were private citizens in the plaintiff State. Indeed, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) —the case that produced outrage about the exercise of federal jurisdiction over a claim by a citizen against a State and directly led to the passage of the Eleventh Amendment, *New Hampshire v. Louisiana*, *supra*, 108 U.S. at 86—was itself an action brought under this Court's original jurisdiction. *See also Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (Eleventh Amendment prohibits original action by foreign government against a State).

There is nothing in the text or history of the Eleventh Amendment that would lead to a different result when the Court is exercising its appellate jurisdiction. Certainly, the Eleventh Amendment is fully applicable to this Court's review of cases from other federal courts. *See, e.g., Welch v. Texas Dept. of Highways and Public Transp.*, 107 S.Ct. 2941 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). In such cases, the Court has referred generally to limits placed by the Eleventh Amendment on "federal jurisdiction," or "the authority of the federal judiciary," or the power of a "federal court," *Pennhurst*, 465 U.S. at 98, 99, 121, 123; it made no distinction between its own authority and the authority of other federal courts.

The same limitations apply to review of judgments from state courts. The Court does not derive judicial power in such cases from the state courts but, as in other

cases, from the provisions of Article III.[31] Indeed, in upholding the legitimacy of its review of state court judgments, this Court has long stressed that Article III describes the kind of case, not the kind of court, that is subject to review. "The appellate power is not limited by the terms of the third article to any particular courts. . . . It is the *case*, then, and not the *court*, that gives the jurisdiction." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338 (1816) (emphasis in original). The Eleventh Amendment likewise, also speaks directly in terms of "Judicial power," prohibiting its exercise in "any suit in law or equity" without regard to the grounds of asesrted jurisdiction.[32]

Although state courts themselves can order payments from a state treasury, that fact does not enlarge the power of this Court. In *State of Louisiana ex rel. New York Guaranty & Indem. Co. v. Steele*, 134 U.S. 230 (1890), for example, the Court applied Eleventh Amendment principles in a suit arising out of state court, holding that it was "virtually a suit against the state." *Id.* at 232. The Court noted that the suit was against a state official "in his official capacity" and that the plaintiff had "sought to compel him to act in that capacity."

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[31] *See, e.g.*, Art. III, sec. 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make").

[32] The Eleventh Amendment does not, of course, bar this Court from hearing a claim that a State's action against an individual, as in a criminal proceeding, violated the federal constitution. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). Such a case is not a suit by a citizen against a State, and is thus outside the scope of the Eleventh Amendment.



*Id.* Citing prior cases under the Eleventh Amendment, the Court upheld the state court judgment.

It would elevate form over substance to say that this Court could require a state court to order a payment from the state treasury, even though the Court lacks power to enter the judgment itself. As a general matter, the Eleventh Amendment cannot be evaded by ordering state officials, rather than the State itself, to make a payment from the state treasury. "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants." *Ford Motor Co. v. Department of Treasury, supra*, 323 U.S. at 464. The imposition of state judges as an additional link in a chain reaching from this Court to a state treasury should not be enough to overcome the Eleventh Amendment prohibition. In that case, as in any other, the State remains the real, substantial party in interest, and the impact on the treasury is just the same.[33]

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[33] In *Great Northern Life Ins. Co. v. Read, supra*, the Court indicated in *dicta* that the taxpayers could seek "review in this Court on constitutional grounds after the issues have been passed upon by the State courts." 322 U.S. at 57. *See also Ford Motor Co. v. Department of Treasury, supra*, 323 U.S. at 470; *Smith v. Reeves*, 178 U.S. 436, 445 (1900). The power to pass upon constitutional issues, however, exists separate and apart from the power, denied by the Eleventh Amendment, to order retroactive awards from a State Treasury. *See, e.g., Bacchus Imports, Ltd. v. Dias, supra* (finding violation of Commerce Clause but remanding to state courts for determination of remedy).

The Court has also said, again in *dicta*, that "[n]o Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'" *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). This statement, read as an explanation of *state* judicial power, is entirely correct: a state court may issue orders that are forbidden to federal courts by the

The use of state courts as intermediate agents also would lead to a peculiar sort of enlargement of judicial power. Despite the usual practice of remanding to state courts for proceedings not inconsistent with its opinion, this Court is presumed to retain the power to enter judgments itself, in cases from state courts as well as federal courts. *See, e.g., Williams v. Bruffy*, 102 U.S. 248 (1880); *Tyler v. Magwire*, 84 U.S. (17 Wall.) 253 (1873); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Martin v. Hunter's Lessee, supra*. If the Court could do indirectly what it cannot do directly—*i.e.* require payments from a state treasury by a remand to state court rather than an order to state officials—it would effectively be increasing its power merely by the discretionary form of its judgment. The notion that the invocation of such discretion can enlarge and contract federal judicial authority conflicts with settled principles of federal jurisdiction.

This Court has said that "[t]o secure the manifest purposes of the constitutional exemption guarantied by the Eleventh Amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose." *Ex Parte Ayers*, 123 U.S. 443, 505-06 (1887). So interpreted, the Eleventh Amendment simply does not allow petitioner to pursue his claim in federal court—whether it is this Court or any other federal court.

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Eleventh Amendment. Thus, had the state courts below ordered retroactive relief (as the Maine Supreme Court did in *Thiboutot*), that order would have clearly been compatible with the Eleventh Amendment. The question here, however, is whether this Court can require payments from the state treasury, notwithstanding the limitations placed on *federal* judicial power by that Amendment.



**B. The Eleventh Amendment Bar Against Retroactive Payments From State Treasuries Will Not Prevent Substantial Protection of Constitutional Rights.**

"The Eleventh Amendment is an explicit limitation of the judicial power of the United States." *Missouri v. Fiske*, 290 U.S. 18, 25-26 (1933). Although adherence to that limitation necessarily places some restraints on remedies for constitutional violations, it does not mean that constitutional rights will go unprotected. The state courts, of course, may provide relief beyond that within the power of federal courts. And federal courts themselves may order substantial relief, notwithstanding the Eleventh Amendment.

First of all, it is well-established that injunctive relief against continuing constitutional violations remains available. Notwithstanding the Eleventh Amendment, federal courts (including this Court) retain authority to enjoin "an illegal act upon the part of a state official in attempting by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional." *Ex Parte Young*, 209 U.S. 123, 159 (1908). This is so even though the injunction has a significant effect on the state treasury. *See Milliken v. Bradley*, 433 U.S. 267 (1977). This principle ensures a full airing of federal constitutional issues and the availability of remedies for ongoing constitutional violations.

Second, the federal courts can entertain suits against state and local officials in their individual capacities. *See Scheuer v. Rhodes*, 416 U.S. 232 (1974). In *Scheuer*, the Court noted that "[w]hile it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, . . . damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Id.* at 238 (citation omitted). The Court pointed out that "[i]n some situations a damage remedy

can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another." *Id.*

Third, suits against local governments are not barred by the Eleventh Amendment because those governments are not within the scope of the Eleventh Amendment. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). Thus, the federal courts are able to entertain a wide range of federal constitutional claims in cases involving local governments. *E.g., Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, supra; Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923).

Lastly, to the extent that Congress wishes to abrogate the state sovereign immunity embodied in the Eleventh Amendment, it is free to do so, at least when acting pursuant to section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Thus, if existing remedies prove inadequate, appropriate congressional action may further narrow the category of cases that the Eleventh Amendment excludes from the jurisdiction of the federal courts.

We also note that the immunity of government treasuries from suits for damages—even in constitutional cases—is hardly an unheard-of notion. This Court long ago observed that "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the Constitution while it was on its trial before the American people." *Hans v. Louisiana, supra*, 134 U.S. at 12. More recently, Justice Frankfurter observed that "[t]he vehement speed with which the Eleventh Amendment displaced the decision in *Chisholm v. Georgia*, . . . proves how deeply rooted that doctrine was in the early days of



the Republic." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (dissenting opinion.)[34]

These principles are little different from those applicable to the federal government to this day. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). That immunity does not vanish merely because it may prevent a plaintiff from obtaining a full measure of monetary relief. *Cf. United States v. James*, 478 U.S. 597, 611-12 (1986). The immunity for state governments embodied in the Eleventh Amendment should receive no less respect.

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[34] Because of the disposition below, the Florida court did not need to decide expressly whether petitioner's claim was barred by sovereign immunity. As noted earlier, the State has waived its sovereign immunity in suits for tax refunds, but only to a limited extent. *See* note 20, *supra*. *Cf. American Trucking Associations, Inc. v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), *cert. denied*, 107 S.Ct. 3262 (1987).

## CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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